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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

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DOCK McKOY, JR.,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

---

On Writ of Certiorari To The Supreme Court of The State of North Carolina

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# BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, CONNECTICUT, GEORGIA, IDAHO, INDIANA, KENTUCKY, MISSOURI, MISSISSIPPI, NEVADA, NEW JERSEY, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, TEXAS, AND VIRGINIA

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United States Constitution
Eighth Amendment 1



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INTEREST OF AMICI CURIAE

Amici curiae are states which have authorized the imposition of death as a possible penalty in specified homicide cases. Each state, through the enactment of its statutory scheme and the interpretation of those statutes by its state courts, has been guided by the requirements of this Court's Eighth Amendment jurisprudence that the sentencer's discretion be channeled and guided, and that the defendant be allowed to introduce relevant mitigating evidence. The states have also accepted this Court's assurance that there is no "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S.

447, 464 (1984). They have, therefore, taken different approaches to the classification of capital cases, *see Lowenfield v. Phelps*, ____U.S. ____, 108 S.Ct. 546 (1988), as well as to the procedures for determining whether death is appropriate in a particular case. *See, e.g., Zant v. Stephens*, 462 U.S. 862 (1983).

Increasingly, however, the states have found that this Court's examination of a particular statutory scheme soon translates into a defense attack on their own statutes. These arguments tend to focus on a single phrase or limited portion of the Court's opinion, taken out of context, and occur whether there are differences or similarities between the provision being reviewed and their own. The interpretation of *Mills v. Maryland*, ___ U.S. ___, 108 S.Ct. 1860 (1988) by Petitioner McKoy illustrates the point.

## SUMMARY OF ARGUMENT

In *Mills v. Maryland*, *supra*, 108 S.Ct. 1860, this Court held that the instructions and a sentencing form might have misled the jurors and thus precluded some of them from considering otherwise relevant mitigating evidence. *Mills* did not hold that the Eighth Amendment precludes the states from imposing burdens of persuasion or unanimity on a defendant with respect to mitigating evidence offered at the penalty phase of a capital trial. It does not stand for the proposition that every instructional error which might have misled a jury regarding its statutory duties automatically constitutes a



violation of the defendant's federal constitutional rights. Rather, *Mills* is, as the North Carolina Supreme Court concluded, a "statute-specific" holding. *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12, 35 (1988).

Amici submit that no one system for imposing the death penalty is, or should be, preferred over any other valid system. "[E]ach distinct system must be examined on an individual basis." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Amici urge the Court to uphold North Carolina's statutes and the instructions given in Petitioner's case not because they are constitutionally compelled, but solely because they are *not* constitutionally prohibited.

## ARGUMENT

### NORTH CAROLINA'S REQUIREMENT THAT THE JURY UNANIMOUSLY AGREE ON THE EXISTENCE OF MITIGATING CIRCUMSTANCES IS NEITHER PROHIBITED BY NOR MANDATED BY THE EIGHTH AMENDMENT AND SHOULD THUS BE UPHELD.

The Court has established "two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fate of those charged with capital offenses. . . . Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his '"character or record and any of the circumstances of the offense."' *California v. Brown*, 479 U.S. 538, 541 (1987). The Court has also acknowledged that these requirements "are somewhat in

'tension' with each other." *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 2331 (1988). Not surprisingly, the states have chosen a variety of approaches to resolve this tension, a diversity which this Court has recognized and endorsed. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Spaziano v. Florida*, *supra*, 468 U.S. at 464. All too often, however, the Court's interpretation of one statutory scheme becomes the foundation for attacks on other statutes. This occurs regardless of whether the challenged scheme is similar or dissimilar to the one reviewed by the Court. More distressing is the tendency to base such attacks on isolated words or phrases taken out of context.[1] This case illustrates the problem.[2]

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1. For a particularly egregious example compare the Court's passing reference to "residual doubt" in *Lockhart v. McCree*, 476 U.S. 162, 181 (1986), with the defense assertion in *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2326, that *Lockhart* endorsed a constitutional right to an instruction on residual doubt.

2. *McKoy* is but one of several recent cases in which the Court has been forced to consider issues that had arguably been resolved by earlier opinions. *See, e.g., Boyde v. California*, No. 88-6613, cert. granted June 5, 1989; *Saffle v. Parks*, No. 88-1264, cert. granted April 24, 1989; *Blystone v. Pennsylvania*, No. 88-6222, cert. granted March 27, 1989. Indeed, the Court has heard argument in *Penry v. Lynaugh*, No. 87-6177, a case dealing in part with the constitutionality of the Texas capital sentencing scheme, despite the fact that it "has been unheld by this Court, and its method for providing for the consideration of mitigating evidence has been cited with favor . . . ." *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331. *See also Hildwin v. Florida*, ___ U.S. ___, 57 L.W. 3778 (1989) (the Court "once again" was asked to consider the question of judge versus jury fact finding in the sentencing phase of a capital case).



In *Mills v. Maryland*, *supra*, 108 S.Ct. 1860, the Court concluded that jury instructions, in conjunction with a sentencing form, might have misled the jurors in their consideration of mitigating evidence. Specifically, the jurors might not have understood that their rejection of a mitigating circumstance had to be unanimous and that failure to unanimously reject the circumstance allowed the jurors to individually weigh it against the proven factors in aggravation. 108 S.Ct. at 1870. There was no indication that failure to agree rendered the mitigating evidence irrelevant. 108 S.Ct. at 1865, n. 7. Since there was a "possibility that a single juror could block" the consideration of relevant evidence and "consequently require the jury to impose the death penalty," the Court held that the death sentence was unreliable and vacated the state court judgment. 108 S.Ct. at 1870.

Seizing upon the "single juror" reference in *Mills*, Petitioner challenges North Carolina's requirement that the jurors may only weigh against the proven aggravating factors those mitigating

circumstances which they unanimously find the defendant to have proved by a preponderance of the evidence. He contends that "*Mills* and the cases upon which it relies stand for the constitutional rule that the death penalty may not be imposed where there is a barrier to the sentencer's consideration of *any* part of the case for mitigation." Brief for the Petitioner, at 31 (emphasis in original). Amici disagree. In our view, concern that the jury in *Mills* might have been misled about its use of relevant mitigating evidence does not suggest rejection of a State's legitimate "role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2330. Indeed, the Court "normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision . . . ." *Booth v. Maryland*, 482 U.S. 496, 502 (1987).

Moreover, Amici submit that *Mills* does not establish that an Eighth Amendment violation occurs simply because a jury may have misunderstood its obligations under the state's capital punishment scheme. In *Mills*, any confusion engendered by the instructions could have resulted in some jurors failing to consider relevant mitigating evidence, thus violating the requirements of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v.Oklahoma*, 455 U.S. 104 (1982). However, an instructional error which leads the jury to an incorrect interpretation of its duty under state law will not constitute a violation of the Eighth Amendment unless the erroneous interpretation of the law is itself prohibited by the United States Constitution. *See, e.g., Barclay v.*



*Florida*, 463 U.S. 939, 956 (1983) (consideration of the defendant's criminal record was prohibited by state law, but did not result in the admission of evidence precluded by the Constitution). In such cases the state is free to apply its own harmless error analysis, but the concerns expressed in *Mills* are not implicated. *Barclay v. Florida*, *supra*, 463 U.S. at 956-958; *People v. Brown*, 46 Cal.3d 432, 446-448, 250 Cal.Rptr. 604 (1988).

Amici endorse Respondent's analysis of the North Carolina statutes and the extent to which they comply with the Eighth Amendment. We do not suggest, however, that its approach is the only, or necessarily the best, method of balancing the tension between channeled discretion and admission of mitigating evidence. Rather, it is but one of many constitutionally acceptable schemes.

This Court has been particularly sensitive to the varying approaches chosen by the states as a means of balancing aggravation and mitigation in the penalty phase of a capital trial. *See Turner v. Murphy*, 476 U.S. 28, 34 (1986); *Zant v. Stephens*, 462 U.S. 862, 875-876, n. 13 (1983). As recently noted in *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331, the Court "has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." *See also Baldwin v. Alabama*, 472 U.S. 372, 374 (1985), which upheld the constitutionality

of a "peculiar and unusual" statutory scheme.

Thus, while North Carolina places a burden of persuasion on the defendant, other states require only that he raise evidence of mitigating circumstances. *See, e.g., Hooks v. State*, 534 S.2d 1453, 1465-1466 (Ala. Crim. App. 1987). Similarly, while some states require the state to prove aggravating circumstances beyond a reasonable doubt, *see, e.g., People v. Brownell*, 79 Ill.2d 508, 404 N.E.2d 181, 194 (1980), others place no burden of proof on the prosecution. *See, e.g., People v. Johnson*, 47 Cal.3d 1194, 1250-1251, 255 Cal.Rptr. 569 (1989). Under some statutory schemes the prosecution must prove beyond a reasonable doubt that aggravation exceeds mitigation, *see, e.g., State v. Williams*, 113 N.J. 393, 550 A.2d 1172, 1206 (1988), but others include no burden on that issue. *See, e.g., People v. Gates*, 43 Cal.3d 1168, 1201, 240 Cal.Rptr. 666 (1987). Although some states require the sentencer to weigh the aggravating and mitigating evidence in order to determine the appropriate penalty, *see, e.g., People v. Brown*, 40 Cal.3d 512, 542-543, 220 Cal.Rptr. 637 (1985), others eschew such a weighing process. *See, e.g., State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63, 65 (1987). Simply put, "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant v. Stephens*, *supra*, 462 U.S., at 875-876 n. 13.

This Court has long recognized the limited and specific nature of its responsibility when reviewing a capital punishment scheme. *Gregg v. Georgia*, *supra*, 428 U.S. at 195. Given past



practice, Amici nevertheless expect that whatever the Court's decision in this case, it will generate renewed attacks on each of the statutory schemes authorizing the death penalty. We urge the Court, therefore, not only to uphold North Carolina's statute, but to reaffirm the position it took in *Pulley v. Harris*, 465 U.S. 37, 45 (1984): "To endorse the statute as a whole is not to say that anything different is unacceptable."

## CONCLUSION

For the reasons stated above, Amici respectfully submit that the judgment of the North Carolina Supreme Court should be affirmed.

DATED: June 7, 1989

Respectfully submitted,

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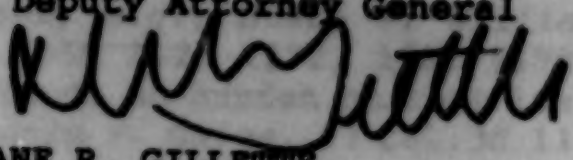

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